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NO. 80-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM P. CLEMENTS, JR., Governor
of the State of Texas, et al.,

Appellants,

v.

JOHN L. FASHING, et al.,

Appellees.

On Appeal from the
United States Court of Appeals
for the Fifth Circuit

APPELLEES' MOTION TO AFFIRM

RAYMOND C. CABALLERO
521 Texas Avenue
El Paso, Texas 79901
915/542-4222
Attorney for Appellees

Of Counsel:

CHARLES LOUIS ROBERTS
Caples Building, Suite 505
El Paso, Texas 79901
915/532-1601

TABLE OF CONTENTS

	Page
Index of Authorities	ii
Question Presented	2
Opinions Below	2
Statement of the Case	3
Argument	7
Conclusion	21
Certificate of Service	21

INDEX OF AUTHORITIES

CASE:	PAGE
Blaue v. Lehman, 368 U.S. 403 (1962)	14
Bullock v. Carter, 405 U.S. 134 (1972)	7,9
California Bankers Association v. Shultz, 416 U.S. 21 (1974)	15,18
Centeno v. Inselman, 519 S.W.2d 889 (Tex.Civ.App. 1975)	17
Dandridge v. Williams, 397 U.S. 471 (1970)	15,18
De Jong v. Oregon, 299 U.S. 353 (1937)	18
Faulkner v. Gibbs, 338 U.S. 267 (1949)	15
Gitlow v. New York, 268 U.S. 652 (1925)	18
Kirchberg v. Feenstra, 49 L.W. 4270 (1981)	14
Langnes v. Green, 282 U.S. 531 (1931)	15
Michael M. v. Superior Court of Sonoma County, 49 L.W. 4273 (1981)	14
Morial v. Judiciary Commission of Louisiana, 565 F.2d 295 (5th Cir. 1977)	19
Near v. Minnesota, 283 U.S. 697 (1931)	19

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) . . 17

Pruitt v. Glen Rose Independent School District No. 1, 84 S.W.2d 1004 (Tex. 1935) . . 17

Schweiker v. Wilson, 49 L.W. 4207 (1981) 14

State ex rel. Kingsburg v. Brinkerhoff, 17 S.W. 109 (Tex. 1886) 17

United States v. Dickinson, 331 U.S. 745 (1947) 15

United States v. Commercial Credit Co., 286 U.S. 63 (1932) 15

United States Railroad Retirement Board v. Fritz, 49 L.W. 4035 (1980) 14

Willis v. City of Fort Worth, 380 S.W.2d 814 (Tex.Civ.App. 1964 n.r.e.) 16

Willis v. Potts, 377 S.W.2d 622 (Tex. 1964) 16

OTHER:

Texas Constitution,
Art. III, Sec. 19 . . . . . 3, seriatim
Art. XVI, Sec. 65 . . . . . 3, seriatim
Art. XVI, Sec. 40 16

U. S. Constitution,
Amend. I 18
Amend. XIV . . . . . 2, seriatim

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By this motion Appellees move to affirm the judgment of the United States Court of Appeals for the Fifth Circuit. For reasons set forth in more detail below, the record and the issues have been fully developed and briefed, the court below has reached a correct decision, and that decision should be affirmed by this Court on the basis of the existing record.

QUESTION PRESENTED

Whether the two lower federal courts were correct that certain classifications of public officials under the Texas Constitution were invidious, served no proper governmental interest, and were therefore invalid under the Equal Protection Clause.

OPINIONS BELOW

The opinion of the district court is published at 489 F.Supp. 471. The Court of Appeals for the Fifth Circuit adopted the opinion of the district court, and its opinion was not published.

STATEMENT OF THE CASE

This is an appeal by the State Appellants from an unpublished per curiam opinion of the Fifth Circuit which affirmed the district court's findings that Article III, Section 19, and the last paragraph of Article XVI, Section 65, of the Texas Constitution created classifications which were invidiously discriminatory and failed to serve any proper governmental interest and were, therefore, invalid under the Equal Protection Clause of the Fourteenth Amendment.

This case was decided on cross-motions for summary judgment. Appellants offered no summary judgment evidence to justify the classifications in issue. The Appellee offered summary judgment evidence that there was no justification for the classifications, and said evidence was not controverted by the Appellants. Appellants defend the classifications in issue before

this Court on the theory that "somewhat imperfect" classifications are constitutionally permissible.

Article III, Section 19, makes ineligible as candidates to the Texas Legislature the following public officials:

a. All judges of any court
b. Secretary of State
c. Attorney General
d. Clerk of any court of record
e. Any person holding lucrative public office.

There is no reciprocal prohibition, however, placed upon any legislator seeking to run or be appointed to any of the above public offices.

Article XVI, Section 65, provides that certain officials automatically vacate their office if they announce as a candidate for any office other than the office they hold and they have more than one year remaining before the end of their term.

The Section 65 resign-to-run rule applies to the following public officials:

a. District clerks
b. County clerks
c. County judges
d. Judges of county courts at law
e. Judges of county criminal courts
f. Judges of county probate courts
g. Judges of county domestic relations courts
h. County treasurers
i. Criminal district attorneys
j. County surveyors
k. Inspectors of hides and animals
l. County commissioners
m. Justices of the Peace
n. Sheriffs
o. Assessors and collectors of taxes
p. District attorneys
q. County attorneys
r. Public weighers
s. Constables

Some of the elected officers to whom Section 65 does not apply are as follows:

a. Governor
b. Lieutenant Governor
c. Comptroller of Public Accounts
d. Treasurer
e. Commissioner of the General Land Office
f. Attorney General
g. Railroad Commissioner
h. State Legislature
i. Any justice or judge of all Texas appellate courts
j. District or criminal district courts
k. Family district courts
l. Juvenile courts
m. Corporation or municipal courts

n. Most mayors, city councilmen, school board members
o. Any judge or presiding officer of any special court.

ARGUMENT

The Fourteenth Amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Constitutional state provisions, like any legislative acts, constitute "state actions" within the meaning of the Equal Protection Clause. Bullock v. Carter, 405 U.S. 134, 140 (1972).

A. Article III, Section 19. This provision of the Texas Constitution of 1876 can be found in the Texas Constitution of 1845 (Art. III, Sec. 25, Art. VII, Sec. 13), 1861 (Art. III, Sec. 25), 1866 (Art. III, Sec. 24), 1869 (Art. III, Sec. 30, and Art. XII, Sec. 9). It is a broad prohibition preventing virtually any elected or appointed office holder from being a candidate for the

Texas Legislature "during the term for which he is elected or appointed . . . ."

This means, for example, that those persons holding elective offices under municipal government are not eligible for election to the Texas Legislature even if they resign, simply because the term for which they are elected would overlap into the legislative term. Moreover, no person holding office for four years could resign at mid-point in the term to run for the legislature because the term would overlap into that legislative term. No similar prohibition exists barring legislators from office in a similar fashion. Article III, Section 19, therefore, creates a classification and a distinction.

The creation by the State of barriers to a candidate's access to the ballot and the corresponding limitations of the field of candidates does not alone require close scrutiny of the provision. However, the prohibition does deny some voters the

right to choose from other candidates and artificially does shield the legislators from competition. That scheme does obviously have an important impact on the exercise of the franchise; therefore, the law does require "close scrutiny" to see that it is "reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." Bullock v. Carter, supra, 405 U.S. at 144.

The only State objective raised by the Appellant in its answer to an interrogatory was that Article III, Section 19, prevented conflicts of interest. The provision makes ineligible for a legislative seat virtually any office holder. The State made no attempt to demonstrate why one office holder would have a conflict of interest in running for the legislature when an incumbent would not. The provision is a simple attempt by incumbents to perpetuate themselves in

office. Certainly that should not be a legitimate State interest which the courts should assist in furthering.

Both the trial and appellate courts below found the classification created to be invidious and invalid under the Equal Protection Clause.

B. Article XVI, Section 65. In November, 1954, XVI-65 became part of the Texas Constitution and at that time did not contain the last paragraph, which was the provision challenged in this suit. In 1954, the provision simply held that certain named officers would have four-year terms instead of two-year terms. Furthermore, the terms of office were staggered so that not all the terms of office would expire at the same time. Prior to 1958, various office holders already had four-year terms of office--among them, judges of the Supreme Court, the Court of Criminal Appeals, the various courts of civil appeals, and others.

Section XVI-65 increased to four years the terms of office for county courts, county courts at law, and justices of the peace, as well as other office holders.

In 1958, the challenged last paragraph was added to XVI-65. It was a totally new law and provided that those listed office holders in XVI-65 would automatically vacate their offices if they either announced their candidacy or in fact became candidates for any other office when more than one year remained in their term. For example, Plaintiff Fashing here was elected to serve a four-year term. If at the end of two years he became a candidate for a district judgeship, he automatically vacated that office he held, that of County Court at Law Judge.

Other judges, such as district judges and judges of the courts of civil appeals, the Court of Criminal Appeals, and the Supreme Court were not bound by a similar

automatic resign-to-run rule, nor, indeed, were municipal court judges. Thus a classification was created, which classificiation must be supported by valid and necessary State interests in order that the provision not violate the Equal Protection Clause.

The sole justification for the classification discrimination at issue offered by the Appellants in this Court and the courts below is that the provision is only "somewhat imperfect." The record is barren of any indication that there are any distinctions between the public officials covered by the burden of the classifications and the public officials not so burdened. Rather, the Appellees' summary judgment evidence shows that in fact there are no distinctions between these public officials for the purposes of Sections 19 and 65. Can a state constitutionally enact a resign-to-run law or ineligible-to-the-legislature law which

operates against one group of public officials but not against another group without any reason for the unequal treatment other than a contention that "somewhat imperfect" laws concerning the right to candidacy and to vote are not a denial of equal protection? Certainly not, for the classifications between public officials in this case were found to be invidious by the two federal courts below.

A classification that is found to be invidiously discriminatory is one which has no reasonable basis and is arbitrary and irrational. In light of this finding in the case at bar, this Court need not articulate a standard of review based upon the character and substantiality of the First Amendment interest of Appellees that is impaired by the restrictions on their political right by Sections 19 and 65. Rather, the standard of judicial review for social and economic legislation can be

applied here to affirm the lower courts. Once any type of legislative classification is found to be invidious, irrational, or arbitrary, it violates equal protection of law under any standard of review. See, United States Railroad Retirement Board v. Fritz, 49 L.W. 4035 (1980); Schweiker v. Wilson, 49 L.W. 4207 (1981); Kirchberg v. Feenstra, 49 L.W. 4270 (1981); and Michael M. v. Superior Court of Sonoma County, 49 L.W. 4273 (1981).

The factual findings made by the courts below of invidious classification will justify this Court to affirm under Rule 16 on the long-established practice not to reconsider findings of fact--here invidious classification--concurred in by two lower federal courts, unless shown to be clearly erroneous. See, United States Railroad Retirement Board v. Fritz, supra, at n.7, dissent by Justice Brennan; Blaue v. Lehman, 368 U.S. 403, 408-409 (1962);

Faulkner v. Gibbs, 338 U.S. 267, 268 (1949); United States v. Dickinson, 331 U.S. 745, 751 (1947); and United States v. Commercial Credit Co., 286 U.S. 63 (1932). The Appellants have not challenged the fact findings of the two lower courts in this Court.

Of course, in the event this Court notes probable jurisdiction, Appellees will assert many more grounds in support of the lower court judgment, whether or not such were relied upon or even considered by the lower courts. See Dandridge v. Williams, 397 U.S. 471, 475, n.6 (1970); accord, California Bankers Association v. Shultz, 416 U.S. 21, 71 (1974); and Langnes v. Green, 282 U.S. 531, 538-539, (1931). This Court may summarily affirm on the sole basis of the factual finding of invidious classification under the rational basis standard.

Finally, Appellants asserted in the lower courts that Section 19 is a prohibition against dual office holding. The lower court pointed out that Section 19 is not a dual office holding prohibition. The Appellants are still asserting at page eight of their jurisdictional statement that Section 19 is a dual office holding rule. This is incorrect. In Texas one is not eligible for the Texas Legislature, even if one resigns one's office before the election. See Willis v. Potts, 377 S.W.2d 622 (Tex. 1964); and Willis v. City of Fort Worth, 380 S.W.2d 814 (Tex.Civ.App. 1964 n.r.e.). Yet all Texas legislators are eligible for all non-legislative offices, notwithstanding that their term of office overlaps the new office they seek, such as a judgeship. The Texas dual office holding rule is found in Article XVI, Section 40, Texas Constitution. Said rule is self executing, for in Texas, when the holder

of one office accepts and qualifies for a second, he automatically relinquishes the first office. See, State ex. rel. Kingsburg v. Brinkerhoff, 17 S.W. 109 (Tex. 1886); Pruitt v. Glen Rose Independent School District No. 1, 84 S.W.2d 1004 (Tex. 1935); and Centeno v. Inselmann, 519 S.W.2d 889 (Tex.Civ.App. 1975).

In this case the Appellants have advanced some State interest or purpose for the resign-to-run rule, but the question remains whether objectives of the resign-to-run rule are advanced in a manner consistent with equal protection of the law. In Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), a valid state interest or purpose did not save a bad classification. The court stated as follows: "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered

by the differential treatment." 408 U.S. at 95.

In this case, although State interests or purposes in the resign-to-run rule may have merit, Texas has determined that all non-Section 65 officials need not be subject to a resign-to-run rule. However, Texas has offered no reason for its unequal treatment, and the lower federal courts in this case found no justification for the rule. Therefore, equal protection is denied.

Although the courts below based their decision solely on the Equal Protection Clause of the Fourteenth Amendment, the ruling may be affirmed by this Court on additional, independent bases under the First Amendment, Dandridge v. Williams, supra; and California Bankers Association v. Shultz, supra, as it is applied to the states through the Fourteenth Amendment, Gitlow v. New York, 268 U.S. 652 (1925); and De Jong v. Oregon, 299 U.S. 353

(1937); and Near v. Minnesota, 283 U.S. 697 (1931).

Although a variety of standards of scrutiny have been utilized by the courts, one standard which can be used in this case is that restrictions on protected activities "are constitutionally permissible if justified by reasonable necessity . . . to burden those activities to achieve a compelling objective." Morial v. Judiciary Commission of Louisiana, 565 F.2d 295, 300 (5th Cir. 1977)(en banc).

To be compelling, the state interests should be of such force that they are "irresistible" or "overpowering," to use two dictionary definitions. In the case of those State interests which were advanced in this case under both III-19 and XVI-65, how could they be compelling objectives when the State only applied them to some officials but not to others? If they were so overpowering, they would

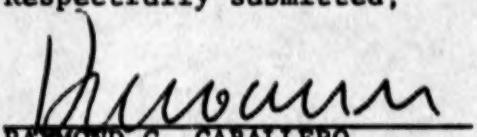
necessarily be applied to all officials similarly situated. Therefore, by its unequal treatment, the State's burden to prove a compelling objective fails at the same time on both First Amendment and equal protection grounds.

The State has attempted to justify the treatment of officials, but it has never sought to justify or explain the difference in treatment among the officials. Although it has been given an opportunity at every stage of these proceedings, the State has not ever attempted to explain the reason for the difference in treatment.

CONCLUSION

For all the foregoing reasons, Appellees urge this Court summarily to affirm the decision of the Court of Appeals in this case.

Respectfully submitted,



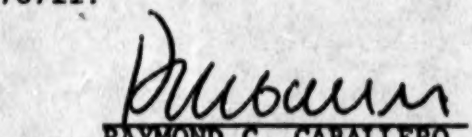
RAYMOND C. CABALLERO
Attorney for Appellees
521 Texas Avenue
El Paso, Texas 79901
915/542-4222

Of Counsel:

CHARLES LOUIS ROBERTS
Caples Building, Suite 505
El Paso, Texas 79901
915/532-1601

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 1981, a true copy of the foregoing Motion to Affirm was served upon Ms. Susan J. Dasher, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, 78711.



RAYMOND C. CABALLERO